Supreme Court, U.S.
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No. 97-564

In the Supreme Court of the United States

OCTOBER TERM, 1997

SRS TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has standing to raise an equal protection challenge to the Small Business Administration's use of racial presumptions as a factor in determining eligibility for a business development contract allocation program for disadvantaged persons where petitioner was precluded from participating in the program based on race-neutral criteria, and was neither ready nor able to compete for the contract at issue in any event.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the judgment is noted at 112 F.3d 510 (Table). The district court's opinion (Pet. App. 6a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1997. A petition for rehearing was denied on July 1, 1997. Pet. App. 11a. The petition for a writ of certiorari was filed on September 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), authorizes the Small Business Administration (SBA) to create a program to assist small businesses that are owned and controlled by "socially and economically disadvantaged" individuals. 15 U.S.C. 637(a). The statute defines "[s]ocially disadvantaged" individuals as persons who have been "subjected to racial or ethnic prejudice or cultural bias because of their identities as a member of a group without regard to their individual qualities." 15 U.S.C. 637(a)(5).

Pursuant to this statute, SBA created the "8(a) program" to help small businesses overcome obstacles that have impaired their ability to compete on an otherwise level playing field. 15 U.S.C. 637(a)(6)(A); 13 C.F.R. 124.1(a). One of the ways the program accomplishes that objective is by helping participants obtain government contracts. Under the 8(a) program, SBA enters into contracts with other government agencies to provide goods or services, and then subcontracts the work to small businesses that are owned and controlled by "socially and economically disadvantaged" individuals.

SBA regulations specify that, to participate in the 8(a) program, individuals must show that they are both "socially" and "economically" disadvantaged. For members of certain designated racial and ethnic groups, SBA regulations create a presumption of "socia[l] disadvantag[e]" for purposes of the 8(a) program. 13 C.F.R. 124.105(b)(1). Individuals who are not members of the designated groups may nonetheless qualify by producing evidence that they per-

sonally have suffered social disadvantage. 13 C.F.R. 124.105(c).

Social disadvantage alone does not qualify an individual to participate, however. Each participant must make an individualized showing of "economic" disadvantage as well. 13 C.F.R. 124.106(a). See *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 207, 238 (1995). SBA regulations provide purely financial criteria for determining economic disadvantage, and establish that "an individual whose personal net worth exceeds $250,000 will not be considered economically disadvantaged for purposes of 8(a) program entry." 13 C.F.R. 124.106(a)(2)(i).

Petitioner SRS Technologies, Inc., is owned by a native of India and was therefore presumed to be "socially disadvantaged" for purposes of the 8(a) program. Pet. App. 3a, 8a, 9a; 13 C.F.R. 124.105(b). Petitioner, however, failed to qualify for the program because its owner is not "economically disadvantaged." 13 C.F.R. 124.106(a)(2)(i). To the contrary, he is a multi-millionaire. Pet. App. 3a-4a, 8a-9a.

2. This case arises out of SBA's allocation of a contract for work at the Pacific Missile Range Facility in Kauai, Hawaii, through the 8(a) program. In the past, a company called TRW had provided technical support services to military facilities throughout the United States under an omnibus contract with the Defense Evaluation and Support Agency (DESA), a component of the Department of Defense (DoD). Pet. App. 2a, 6a. Under the contract, TRW provided services at the Pacific Missile Range Facility as well as many others. Pet. App. 2a, 6a. Petitioner, a subcontractor with TRW, periodically provided technical support to TRW on military projects nationwide, and occasionally—twice by the end

of 1995—received Pacific Missile Range Facility assignments from TRW. *Id.* at 2a-3a, 6a-7a.

Nothing in the omnibus contract between DESA and TRW required DESA to send Pacific Missile Range Facility work to TRW. Instead, DESA had the option of performing the work itself using government employees or awarding the project to a contractor other than TRW. Pet. App. 9a. Similarly, nothing in the contract between TRW and petitioner required TRW to assign its Pacific Missile Range Facility work to petitioner. Rather, TRW could perform the work itself or pass it to subcontractors like petitioner. *Id.* at 5a, 9a-10a.

In order to cut costs, DoD decided in 1995 that it would no longer use the omnibus contract with TRW for work at the Pacific Missile Range Facility. Pet. App. 2a, 7a. DoD determined that it could save approximately $200,000 in overhead expenses by contracting directly for such services instead. *Id.* at 7a. Once it learned of DoD's decision, petitioner expressed interest in contracting directly with the government to perform the Pacific Missile Range Facility work, but never came forward with an acceptable proposal. *Ibid.*

Moreover, petitioner was ineligible to compete for such a contract unless TRW agreed to waive a conflict-of-interest clause in petitioner's TRW subcontract. Pet. App. 4a. That clause prohibited petitioner from entering into other contracts that involved tasks that were directly related to the work that petitioner performed under its contract with TRW, unless TRW granted a waiver. *Ibid.* Petitioner has not alleged that TRW agreed to such a waiver with regard to Pacific Missile Range Facility work. See *ibid.*

In November 1995, the government awarded the Pacific Missile Range Facility contract to High Technology Solutions, Inc. (HTS) through the 8(a) program. HTS's owner is of Philippine ancestry and thus, like petitioner's owner (a native of India), is presumed to be "socially disadvantaged" for purposes of the 8(a) program. See 13 C.F.R. 124.105(b). Unlike petitioner's owner, however, HTS's owner also was able to meet the economic disadvantage requirement. Gov't C.A. Br. 13.

3. Petitioner filed suit challenging the award of the contract to HTS. Pet. App. 2a. Specifically, petitioner claimed that the 8(a) program's use of a race-based presumption to determine social disadvantage violates the equal protection guarantees of the Constitution. *Id.* at 2a, 3a-4a, 8a. Petitioner also raised non-constitutional challenges to the contract award, arguing that the government failed to comply with its own regulations or with the Administrative Procedure Act. *Id.* at 2a, 3a, 4a-5a, 8a, 10a.

The district court dismissed petitioner's lawsuit. Pet. App. 3a, 9a-10a. Finding that race "had nothing to do with [petitioner's] failure to win th[e] contract," the court held that petitioner lacks standing to raise an equal protection challenge to SBA's use of racial criteria as a factor in determining 8(a) program eligibility. *Id.* at 9a. Petitioner, the district court pointed out, is "an intended beneficiary, not a victim, of the racial classification it challenges" since its owner belongs to a racial group presumed to be "socially disadvantaged" for 8(a) program purposes. *Ibid.* In addition, the court explained, petitioner is ineligible for the 8(a) program because a race-neutral fact—the wealth of its owner—precluded petitioner from qualifying as "economically disadvantaged."

Ibid. Finally, even if HTS had not received the contract award under the 8(a) program, the possibility that petitioner would have been eligible to perform the work at the Pacific Missile Range Facility was simply too remote and speculative to support a claim of actual injury. *Id.* at 9a-10a. The district court also held that petitioner lacks standing to raise its non-constitutional claims. *Id.* at 10a.

4. In an unpublished opinion, the court of appeals affirmed. Pet. App. 1a-5a. The court read petitioner's equal protection claim as challenging only the use, in SBA regulations, of "racial presumptions to determine 'social disadvantage'" for purposes of entry into the 8(a) program. *Id.* at 2a; accord *id.* at 3a-4a (petitioner challenges "the racial presumptions of social disadvantage in SBA regulations implementing section 8(a) of the Small Business Act"). The court then concluded that petitioner lacks standing to raise that claim because it failed to "demonstrate a 'causal connection between the injury and the conduct complained of.'" *Id.* at 3a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In particular, the court explained, petitioner "was not prohibited from participating in the 8(a) Program for race-based reasons," but rather "was ineligible to participate * * * because its owner is a multi-millionaire whose net worth exceeded SBA's guidelines for economic disadvantage by several orders of magnitude." *Id.* at 4a.

The court also held that petitioner lacks standing to raise its non-constitutional claims because petitioner would have been ineligible to compete for the Pacific Missile Range Facility contract even if SBA had not reserved that contract for disadvantaged persons under the 8(a) program. Pet. App. 4a-

5a. In particular, the court explained, the conflict-of-interest clause in petitioner's contract with TRW barred petitioner from competing for Pacific Missile Range Facility work absent a waiver from TRW. The court of appeals concluded that petitioner "cannot establish standing" because its "ability to compete for the [Pacific Missile Range Facility] contract in this situation would depend on the 'independent action of some third party not before the court.'" *Id.* at 4a (quoting *Lujan*, 504 U.S. at 560).

5. Petitioner filed a petition for rehearing. The petition did not address petitioner's standing to raise its equal protection claim. Instead, it addressed only the court of appeals' holding that petitioner lacks standing to allege a violation of 13 C.F.R. 124.309. Rehearing Pet. 2. The government violated Section 124.309, petitioner alleged, by failing to analyze the impact, on other small businesses, of awarding the Pacific Missile Range Facility contract to HTS under the 8(a) program. *Ibid.* The court of appeals denied the petition. Pet. App. 11a.

ARGUMENT

The court of appeals correctly held—and petitioner does not dispute—that petitioner lacks standing to challenge the use, in SBA *regulations*, of a race-based presumption to determine "social disadvantage" for purposes of the 8(a) program. To the contrary, petitioner appears to concede that, because the use of race-conscious criteria in SBA regulations did not affect petitioner's eligibility for the 8(a) program—and a change to eliminate its race-consciousness would not render him eligible—both proof of causation and redressability are lacking.

Instead, petitioner asks the Court to decide a question that neither the district court nor the court of appeals addressed: whether petitioner has standing to challenge the *statute* authorizing the 8(a) program—and thus the 8(a) program in its entirety—as inconsistent with the Constitution. Because the courts below did not address that claim, because there is no division of appellate authority as to the proper analysis of such a claim, and because the facts indisputably show that petitioner lacks standing to assert such a claim in any event, further review is not warranted.

1. A plaintiff must make three showings to establish standing under Article III of the Constitution: (1) an "injury in fact," (2) a "causal connection between the injury and the conduct complained of," and (3) a likelihood, as opposed to mere speculation, "that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing to sue. *United States* v. *Hays*, 515 U.S. 737, 743 (1995).

The court of appeals correctly held that petitioner failed to bear this burden. The court read petitioner's constitutional claim as challenging only SBA's regulations, which use a race-based presumption to define which individuals are "socially disadvantaged" for purposes of entry into the 8(a) program. Pet. App. 2a, 3a-4a. The court then properly concluded that there was no link between that presumption and petitioner's inability to participate in the 8(a) program, since petitioner is ineligible for a race-neutral reason: Its owner is a multi-millionaire and thus cannot meet the prerequisite of being "economically disadvantaged." Since petitioner failed to establish a "causal

connection between [its] injury and the conduct complained of," *Lujan*, 504 U.S. at 560—and could not show that its injury would be redressed by a ruling requiring elimination of the race-conscious presumption it was challenging—the court of appeals' conclusion that petitioner lacks standing was manifestly correct.

2. Nonetheless, petitioner asserts that the court of appeals' analysis mischaracterizes the nature of its complaint. As noted, the Fourth Circuit—like the district court before it—read petitioner's claim as challenging solely the use, under SBA regulations, of a race-based presumption as a factor in 8(a) program eligibility determinations. In other words, the court of appeals understood petitioner's claim as a challenge to the manner in which SBA regulations identify who is "socially disadvantaged"—not as a more sweeping attack on the statute that authorizes the 8(a) program or as a challenge to the 8(a) program as a whole.

Petitioner now claims, however, that it is not challenging the race-conscious criteria in SBA regulations. Instead, petitioner appears to claim that it is challenging the statute that authorizes the 8(a) program—and SBA's reservation of contracts for disadvantaged persons under the program—as racially motivated and unconstitutional entirely apart from the race-conscious criteria in SBA regulations. Under this new theory, petitioner asserts, petitioner can show injury because reserving the Pacific Missile Range Facility contract to 8(a)-qualified companies deprived petitioner "of an opportunity to compete for [the] federal contract" through an open bidding process. Pet. 8; Pet. 9 n.8 ("It is this denial of the *opportunity* [to compete] which causes the injury in fact."). The D.C. Circuit, petitioner asserts, has held

that a plaintiff challenging the 8(a) program as a whole on such grounds has standing if (among other things) it can show that it would have been "ready, willing and able to compete for the contract" but for the contract's being set aside under the 8(a) program. Pet. 8-10 & n.8 (citing *Dynalantic Corp.* v. *Department of Defense*, 115 F.3d 1012 (D.C. Cir. 1997)).

To the extent petitioner contends that both the court of appeals and the district court misinterpreted the nature of its equal protection challenge, that case-specific issue lacks sufficient general importance to warrant review by this Court. Indeed, if petitioner believed that the court of appeals had misunderstood the scope of its constitutional claim, petitioner could have raised that issue in the petition for rehearing that it filed in the court of appeals. Yet the rehearing petition never alleged that the court of appeals had misconstrued petitioner's constitutional claim.[1]

Petitioner thus does not directly dispute that the court of appeals correctly resolved the more limited question that the court reasonably understood petitioner to have presented to it. Petitioner instead asks this Court to decide a question that neither the district court nor the court of appeals addressed—whether petitioner would have standing to challenge the constitutionality of the statute authorizing the 8(a) program (and the use of an 8(a) program at all) independent of the racial presumption contained in

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[1] This case thus stands in sharp contrast to *Dynalantic*, upon which petitioner relies. In that case, the plaintiff sought leave to amend its pleadings while on appeal to clarify that it was challenging the entirety of the 8(a) program as unconstitutional. See 115 F.3d at 1015.

SBA regulations. That question should not be addressed by this Court in the first instance. Accordingly, further review of the decision below is neither warranted nor appropriate. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 & n.2 (1989); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

In any event, petitioner's claim is without merit. Relying on the D.C. Circuit's decision in *Dynalantic*, petitioner asserts that a plaintiff challenging the 8(a) program as a whole—unlike a plaintiff challenging just the race-conscious regulations promulgated thereunder—has standing to sue if (among other things) the plaintiff can show that it would be "ready, willing and able to compete for the contract" if the contract had not been reserved for the socially and economically disadvantaged under the 8(a) program. See Pet. 9 n.8 ("the true test" for standing "is whether [the complainant] is ready, willing and able to compete for the contract").[2] Petitioner thus claims that his injury was the inability to compete for the contract, that the injury was caused by the existence of the 8(a) program, and that the injury would be redressed by a finding of unconstitutionality and the program's consequent elimination. See Pet. 8-9.

Petitioner, however, lacks standing even under that theory, because petitioner is not "ready, willing and

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[2] See also *Dynalantic*, 115 F.3d at 1016 (plaintiff has standing if it would be "able and ready to bid on [the] contracts"); *id.* at 1017-1018 (plaintiff able to show that it "would be able to compete immediately on equal footing" and is "ready, willing, and able to bid" for the contracts).

able to compete for the contract" in any event. Affirming the dismissal of petitioner's non-constitutional challenges, the court of appeals explained that, "even assuming that the government would open the [Pacific Missile Range Facility] contract" to competition if petitioner were to prevail, petitioner "would still lack standing." Pet. App. 4a. The court observed:

> [Petitioner's] contract with TRW prohibits [petitioner] from entering into other contracts which involve tasks that are directly related to work that [petitioner] has performed under the TRW subcontract unless TRW grants a waiver. If the contract were open to competitive bidding, it is not certain that such a waiver would be forthcoming, as TRW might well desire to bid on the contract itself. Since [petitioner's] ability to compete for the [Pacific Missile Range Facility] contract in this situation would depend on the "independent action of some third party not before the court," [petitioner] cannot establish standing.

Ibid. (quoting *Lujan*, 504 U.S. at 560).

The same analysis applies to petitioner's constitutional claims. Petitioner cannot claim that the 8(a) program *caused* its injury by preventing it from competing, because petitioner's TRW contract would preclude petitioner from competing even if the 8(a) program were struck down and the Pacific Missile Range Facility contract were put out for public bid. Nor can petitioner claim that success on the merits would *redress* its injury, since petitioner would remain ineligible to compete for the contract even if a

court were to strike down the 8(a) program at petitioner's behest.[3]

3. For these reasons, there is no conflict between the decision below and the D.C. Circuit's decision in *Dynalantic*, 115 F.3d at 1105. In *Dynalantic*, the D.C. Circuit held that Dynalantic Corporation had standing to raise an equal protection challenge to the government's decision to place certain contracts in the 8(a) program even though Dynalantic's ineligibility for the 8(a) program had nothing to do with race. *Id.* at 1015-1018. The court so concluded, however, because it understood Dynalantic to challenge the statute authorizing the 8(a) program—and thus the 8(a) program in its entirety—rather than merely the race-conscious criteria used by SBA regulations to determine eligibility for the program. *Id.* at 1015-1016; see also *id.* at 1019-1020 (Edwards, C.J., dissenting) (disagreeing with result because statute on which 8(a) program is founded does not even mention race and is clearly constitutional). Hence, the D.C. Circuit held that if the plaintiff were to prevail and the 8(a) program were eliminated in its entirety as unconstitutional, the contracts would be put out for bid and the plaintiff would be able to compete for them; the plaintiff's injury would thus be redressed. *Id.* at 1018.

Nothing in the Fourth Circuit's decision suggests disagreement with the D.C. Circuit's analysis of when a plaintiff has standing to challenge the con-

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[3] The speculative possibility that TRW might waive the clause is not sufficient to overcome petitioner's inability to show that its injury is redressable. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-46 (1976); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973).

stitutionality of the statute authorizing the 8(a) program. It simply did not understand petitioner to be making that sort of challenge. Similarly, nothing in the D.C. Circuit's opinion in *Dynalantic* suggests that if the plaintiff there had challenged only SBA's race-conscious regulations under the 8(a) program and not the statute itself, the D.C. Circuit would have reached a different result from that reached by the Fourth Circuit here. To the contrary, the D.C. Circuit was careful to distinguish the case of a claimant challenging only the regulations that prevented participation in the 8(a) program. See 115 F.3d at 1016 (emphasizing that the plaintiff there "has no desire to participate in the 8(a) program"); *ibid.* ("whether it could meet the non-race-conscious requirements" of 8(a) is relevant only if the plaintiff "seek[s] to qualify for the 8(a) program"). Because there is no conflict between the Fourth Circuit's unpublished opinion below and the D.C. Circuit's decision in *Dynalantic*, no further review is warranted.

4. Even if there were tension between *Dynalantic* and the court of appeals' decision below, this case would not be an appropriate vehicle to address it.

First, petitioner lacks standing to challenge the use of a racial criterion in the program because it "is an intended beneficiary, not a victim, of the racial classification it challenges." Pet. App. 9a. The 8(a) program is designed to assist socially disadvantaged individuals, and petitioner—because its owner is from India—is presumed to be "socially disadvantaged" under SBA rules. Indeed, that race-conscious presumption previously enabled petitioner to receive a government contract under DoD's Small Disadvantaged Business (SDB) program (*id.* at 9a-10a), which

employs the same presumption.[4] Thus, the alleged flaw in the program on which petitioner bases its challenge—the program's race-consciousness—inures to petitioner's benefit.[5]

Second, petitioner lacks standing under any conceivable standing test, including the "ready, willing and able" test petitioner itself proposes (Pet. 9 n.8), and attributes to the D.C. Circuit (Pet. 9-10). As explained above (pp. 11-12, *supra*), petitioner cannot claim that the program caused its injury (the lack of an opportunity to compete) or that eliminating the program as unconstitutional would redress that injury because the terms of petitioner's TRW contract render petitioner ineligible to compete for the Pacific Missile Range Facility contract independent of the 8(a) program and regardless of how petitioner's constitutional claims might be resolved by the courts.

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[4] 13 C.F.R. 124.105(b), 124.602(*l*). See *SRS Technologies* v. *United States*, 894 F. Supp. 8, 10 n.2 (D.D.C. 1995); *SRS Technologies* v. *United States*, 843 F. Supp. 740, 741 (D.D.C. 1994).

[5] Petitioner does not allege that the government treats persons of Indian ancestry less favorably than other individuals in awarding 8(a) contracts. SBA's presumption gives the same advantage to natives of India as it does to individuals, such as HTS's owner, who are of Philippine ancestry. See 13 C.F.R. 124.105(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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